UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

IGRAMO ENTERPRISE, INC.

and **Case No. 29-CA-27247**

ORCES FRIAS,
An Individual

and **Case No. 29-CA-27320**

GUSTAVO BETANCOURT,
An Individual

Nancy K. Reibstein, Esq., Counsel for the General Counsel
David H. Singer, Esq., Counsel for the Respondent

DECISION

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York on various days from March 21 to April 26, 2006. The charge in Case No. 29-CA-27247 was filed by Frias on October 31, 2005 and the charge in Case No. 29-CA-27320 was filed by Betancourt on December 13, 2005. The Consolidated Complaint was issued on January 26, 2006 and alleged as follows:

1. That on or about August 12, 2005, various employees including Frias and Betancourt sent a petition to the Respondent regarding a demand for a wage increase.

2. That in or about October 2005, Frias and Betancourt by telephone and in person, requested a meeting with Grace Moya, Respondent's owner, in order to discuss a wage increase and other benefits.

3. That on or about October 15, 2005, employees of the Respondent, including Frias and Betancourt, demanded a wage increase and other benefits in a meeting with Moya.

4. That in October 2005 and also on or about October 17, 2005, the Respondent by Moya **(a)** threatened employees with unspecified reprisals, **(b)** solicited employees to resign, and **(c)** threatened employees with discharge.

5. That on or about October 15, 2005, the Respondent by Pedro Carrerra threatened employees with plant closure.

6. That on or about October 17, 2005, the Respondent, for discriminatory reasons, reduced Betancourt's work by taking away his evening route.

7. That on or about October 22, the Respondent, for discriminatory reasons, discharged Frias.

8. That on or about October 22, 2005, the Respondent by William Aspiazu, threatened employees with discharge because of their protected concerted activities.

9. That on or about November 30, 2005, the Respondent, by Moya, threatened employees with discharge because of their protected concerted activities.

10. That on or about December 5, 2005, the Respondent by Moya threatened employees with plant closure.

Apart from denying the substantive allegations of the Complaint, the Respondent claims that the drivers who work for the Company are independent contractors and not employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following:

Findings of Fact

I. Jurisdiction

The parties agree and I find that the Employer is engaged in commerce as defined in Section 2(6) and (7) of the Act.

II. The Status of the Drivers

In *BKN, Inc*., 333 NLRB No. 14, (2001), the Board listed a number of factors to be taken into account. These include: **(a)** The extent of control that the employing entity exercises over the details of work; **(b)** Whether or not the one employed is engaged in a distinct occupation or business; **(c)** The kind of occupation, including whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; **(d)** The skill required in the particular occupation; **(e)** Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; **(f)** The length of time for which the person is employed; **(g)** The method of payment, whether by the time or by the job; **(h)** Whether or not the work is part of the regular business of the employer; **(i)** Whether the parties believe they are creating the relation of master and servant; and **(j)** Whether the principal is or is not in business. [Restatement of the Law of 220 Agency 2d, pp. 485-486.] See also *NLRB v. United Insurance Company*, 390 U.S. 254; *Community for Creative Non-Violence v. Reid*, 490 U.S. 730.

In *Roadway Package System*, 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp*., 326 NLRB 884 (1998) the Board reconsidered its standards for determining if an individual is a employee within the meaning of Section 2(3) or an independent contractor. In *Roadway*, the Board stated:

> [w]hile we recognize that the common-law agency test described by the Restatement ultimately assesses the amount or degree of control exercised by an employing entity over an individual, we find insufficient basis for the proposition that those factors which do not include the concept of "control" are insignificant when compared to those that do. Section 220(2) of the Restatement refers to 10 pertinent factors as "among others," thereby specifically permitting the

> consideration of other relevant factors as well, depending on the factual circumstances presented. . . . Thus, the common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control. . . . To summarize, in determining the distinction between an employee and an independent contractor under Section 2(3) of the Act, we shall apply the common-law agency test and consider all the incidents of the individual's relationship to the employing entity.

I also note that the burden of proof lies with the party asserting that a person or persons are independent contractors. *BKN, Inc.*, 333 NLRB at 144; *Community Bus Lines*, 351 NLRB No. 61 (2004).

The Respondent is one among about twelve small companies that are subcontractors to a company called Antech, which is located in Long Island. Antech is a division of a larger company that also owns animal hospitals, operates a laboratory that analyzes blood samples picked up from vetinarians and vetinary hospitals. Antech's geographic scope of operations runs from Rhode Island to Florida.

Many years ago Antech utilized its own employees to pick up these samples. But at some point about ten to twelve years ago, Antech decided to outsource this work to people, some of who were its own drivers, who set up small courier companies. Ignacio Moya, the founder of Igramo, was originally a driver for Antech. Over time, he and another former Antech driver, Gildardo Ortiz, took over an expanding number of routes from Antech and started to hire a group of drivers to run these routes. Gildardo Ortiz, along with Ignacio Moya, were the two people who essentially ran this company.

At the time of these events, (in 2005 and 2006), Ignacio Moya had passed away and the business was taken over by his wife, Grace Moya. She had no previous experience in this business and to a large extent she relied on Gildardo Ortiz and on her son and son-in-law, who also were in the business. Her son is William Aspiazu and her son in law is Markles Rosado.

In 2006, the Respondent operated more than 30 routes. In the New York/New Jersey area, these routes were in Brooklyn, Manhattan, the Bronx, Westchester County and New Jersey. In addition, the Respondent has routes in Philadelphia and Southeast Florida. For the routes in the New York/New Jersey area, these generally were done by a group of drivers who, with a couple of exceptions, drove an assigned route or routes. In the case of the Florida routes, the Respondent contracted with a driver located in Florida who operated under a corporate name and who, in turn, utilized a group of about twelve drivers to pick up samples on those routes. At the end of the day, the blood samples from Florida were air shipped to New Jersey where a driver from Igramo would pick up the samples and drive them to Antech. In the case of the Philadelphia routes, these are operated in essentially the same manner as the Florida routes except that there are fewer of them. These routes have been contracted to a man named David Schaeffer who has set up his own little business and has hired a group of his own drivers who collect blood samples. He has eight routes with eight drivers. These samples are driven up to New Jersey each day and are then collected and driven to Antech by one of the Igramo drivers.

It should be noted that the drivers who are involved in this case, including the alleged discriminatees, do only that. They perform functions that are the essential part of the Respondent's business. They work exclusively for Igramo, on an at-will basis, and generally do so on a five or six day per week basis. There are no written contracts or any types of written documents such as a letter confirmation that memorializes the terms and conditions under

which the drivers work. Many of the drivers have worked for Igramo for many years and therefore have long standing exclusive relationships with the Respondent.

Because of the time constraints involved, drivers cannot offer their services to any other persons during the time that they perform services for Igramo. They simply drive along a predetermined course, pick up blood samples along the way and deliver them to a central point in New Jersey where they are aggregated and driven by another person to Antech's Long Island laboratory.

The routes are essentially determined by Antech and are based on geography and time. That is, when Antech makes a contract with a doctor or hospital, it arranges for a suitable time to pick up the samples in relation to that person's geographic location. The result is that Antech, and sometimes in conjunction with the Respondent, sets up a route by which a driver will go from point A to Point B to Point N over a predetermined route so that the driver will arrive at the time that Antech and its customer have arranged for the pick up. Although a driver may have some leeway in choosing one street over another, the basic route, in terms of the sequence of pickups and the times that the pickups have to be made, is not within the driver's control. Nor may a driver change the places or persons from whom he may make pickups. He can't drop a pickup or make arrangements with some else to make some kind of pick up or delivery to that person while on the route.

Antech is the entity that sells the service to doctors and hospitals. Neither Igramo nor its drivers have anything to do with this. If Antech contracts with a new doctor or if an animal hospital drops its services, Antech's traffic department, perhaps in conjunction with the people in Igramo's management, are the ones who will modify the routes. The drivers have absolutely no say in that process. In short, I cannot see how the drivers have any control over what they do or how they do it. And since what the drivers do is to simply drive along a predetermined route, one cannot say that this entails any degree of skill on their part. In a sense, this can be described as an outdoor assembly line.

There are, nevertheless, a small number of drivers who, over time, have made arrangements with Igramo to do multiple routes and who have hired other drivers to do the extra routes. At one end of the spectrum would be Annabelle Jost, Grace Moya's sister, who has three routes, one of which she drives herself, one of which is driven by her husband and one of which is driven by a third person. Another example would be Danilo Garcia who has arranged with Igramo to do four routes and has ceased driving himself while hiring four other people to do these routes. (He makes a profit from the difference that he gets paid by Igramo for the routes and the amounts that he pays his drivers). At the other end of the spectrum are the two individuals such as David Schaeffer and the man in Florida who run their own little businesses with about eight to twelve drivers. In effect, they are to Igramo as Igramo is to Antech. Under *Dial-Mattress Operating Corp*., 326 NLRB 884, 1998, these four individuals might arguably be considered to be independent contractors as they operate what amounts to mini-businesses, where they hire their own employees to service the routes on a regular basis and can derive a profit from their use of others. In my opinion, however, the people found to be independent contractors in *Dial-Mattress Operating Corp*. operated far more independently than at least two of the four people mentioned above. They had a great deal more control over their own operations including the ability to refuse assignments and the ability to perform services for other companies.

But these are the exceptions. And in my opinion, the exceptions do not make the rule. For the vast majority of the drivers who perform services directly for Igramo, they are given routes that they drive by themselves and they are paid on a route basis. (They receive a certain

amount per route). They do not have any particular skills and they are not responsible for the employment of others. These drivers have no say as to where they go and when they are supposed to get there. And they have a minimal degree of discretion in how they are to get there. They have no ability to work for anyone else at any time that they provide services for Igramo and have no opportunity to increase their earnings by their own efforts. Moreover, the record shows that the arrangement between the Company and the drivers is entirely one sided, with the Company unilaterally establishing, without any negotiations, the compensation that the drivers receive. This was demonstrated when the drivers attempted, in the autumn of 2005, to change their compensation in light of increased gasoline prices. They were told by Moya that this was not possible.

The Respondent claims that all of the drivers have the authority to hire other drivers to operate their routes. But any reasonable view of the evidence shows only that when the unexceptional driver gets ill or wants to take a vacation, he or she can arrange for someone like a friend or relative to operate the route in the driver's absence. But even in that circumstance, the prospective replacement will be interviewed by Gildardo Ortiz and approved by him. The evidence shows that if a driver gets ill or needs to leave on a temporary basis and can't find someone to replace himself, then the two or three people who work in the Respondent's office will pick up the slack and drive the routes.

The Respondent showed that the drivers are paid on a route basis and not on a salaried or hourly basis. The drivers are given a 1099 tax form at the end of each year and no deductions are taken out for federal or state Income Taxes. Nor are any deductions made for Social Security or Medicare. Igramo does not make any payments to any State Unemployment agency and does not provide for Workers' Compensation Insurance. The drivers are paid for their routes and do not have any other employer paid benefits. All of the drivers own their own cars. They are responsible for purchasing gasoline, their own insurance and for making repairs to their vehicles. (Presumably they deduct these expenses from their income when they submit their tax filings). If a driver, while making pickups, were to get into an accident and injure another person, there would be an interesting question as to who would be responsible for personal injuries. Apparently that hasn't happened yet.

The Respondent argues that all of the above demonstrates that the drivers in this case are independent contractors and not employees. But in my opinion, these factors fall short of establishing that they are not employees. To the extent that the Respondent has failed to make deductions for taxes, social security and has failed to make payments for workers' compensation or for unemployment insurance, this does not establish that these people are independent contractors. *Community Bus Lines*, 341 NLRB No. 61 (2004); *Houston Building Services Inc*., 296 NLRB 808. In my view, it merely demonstrates that the Respondent is probably violating a substantial number or other federal and state laws in the way it is treating persons who perform services exclusively for Igramo and who have no right of control over the ends or means of their work. See *Stanford Taxi*, 332 NLRB 1372, 1373 (2000); *Community Bus*, supra, *Houston Building*, supra, *Roadway Package System*, 326 NLRB 842, 848-855 (1998).

III. The Alleged Unfair Labor Practices

By the summer of 2005, gasoline prices had soared to new highs. As the price of gas was a major component in the cost of driving the routes, some of the drivers decided to ask Grace Moya for an increase to cover this additional cost. Among the people who were involved in the creation of a petition, were Gustavo Betancourt, Orces Fria, Jaime Alarcon, Jose Roa, Harold Gonzalez, Walter Barrera, and Annabelle Jost. The latter two individuals were Moya's

brother-in-law and sister. The evidence also shows to my satisfaction, that Moya was not adverse to this petition and suggested to Harold Gonzalez, (who actually wrote the document), that it also be sent to Antech, as that ultimately would be where any additional money would have to come from. Indeed, General Counsel Exhibit 5 shows that it was cc'd to Jack Buckley, the traffic manager for Antech.

This petition, as it deals with a request for an increase in pay, should be considered to be protected concerted activity within the meaning of Section 7 of the Act.

After sending the petition, Betancourt on several occasions, tried to set up a meeting with Moya to discuss the petition. In these conversations, Moya took the position that she could not give the drivers any raises because they were independent contractors and because she hadn't gotten any more money from Antech. Betancourt testified that during one conversation, Moya said that if the drivers were not satisfied, why didn't they just resign and leave the company. He also testified that Moya said that she had a Jewish lawyer and that the Labor Department couldn't touch her and that she was protected by God. According to Betancourt, she said that if he kept it up, she was going to fire him.

On Saturday, October 15, 2005, a group of drivers held a meeting with Moya outside the A&R Hospital. Moya had asked Pedro Carrera, her accountant, to accompany her and speak to the drivers. Also in attendance were about twelve drivers, including Betancourt, Frias, Roa, Annabelle Jost, and Jaime Alarcon.

Betancourt testified that Frias welcomed Moya who said that they had to work with love; that they had to work together and if they did, everything would be resolved. Betancourt states that Roa, seconded by Jaime Alarcon, said that they were there because of the problem with the cost of gasoline. At some point, a letter, (General Counsel Exhibit 11), apparently typed up in preparation for this meeting, was given to Moya. It is unclear who prepared this letter or who handed it to the Company.[1] In any event, there doesn't seem to be any dispute that it was tendered and that it read as follows:

> The following issues are the ones we want to discuss in the meeting to be held on the day and at the time agreed by the parties.
> 1. Money increase for the high cost of gasoline
> 2. Pay for six (6) holidays
> 3. Vacations pay fifteen (15) days
> 4. Pay for canceled days due to snow
> 5. Sick days
> 6. Pay for the overcharge up to 20% or 30% for the gasoline when we work with snow
> 7. Pay tolls to drivers who use it
> 8. Pay for sample picked up at each on of the new hospitals
> 9. Recognize one payday as vehicle maintenance. In case of an accident, the company must pay rent a car charges
> 10. Show that drivers from other contractors earn $1.50 per mile plus the pay of gasoline, plus the pay of tolls. This is the base to negotiate
> 11. Raises

[1] Carrera testified that it was Betancourt who handed the petition to him.

Betancourt states that Moya responded by saying that the drivers could not get benefits because they were independent workers. According to Betancourt, Moya's sister, Annabelle Jost, said that they were not independent drivers to which Moya responded that if they wanted more money, they had to get part time jobs. According to Betancourt, Moya's brother-in-law said that they couldn't work at any other jobs because there was not enough time to drive and do a second job. Betancourt testified that Moya introduced Carrera and said that he was the accountant and knew all about the Company's numbers. He states that Carrera said that the drivers were independent workers, that they had no legal rights to any benefits, and that the Company could give them nothing.

Betancourt testified that when Moya declared the meeting over, he spoke up and told her that they had come to the meeting to resolve a problem and that they shouldn't leave things the way they were. Betancourt testified that he told her: "We just want to get more money to be able to pay for the gasoline." Betancourt testified that he said that since the meeting had not resolved anything, they would be obliged to send the letter to the Department of Labor. At this point, according to Betancourt, Carrera got very agitated. Betancourt testified: "He came right into my face and said how could it be possible that you do this with us? If you people send this letter to The Department of Labor they'll close the company. Where's the gratitude you should show to the Company? The Company has maintained you for more than 10 years. They've filled your belly." At this point, according to Betancourt, Moya said: "Now I know what's happening. I have the petition. And we're going to meet. I'm going to call you one by one." Betancourt states that Moya said that "everyone who had signed that letter was going to have drastic consequences."

Orces Frias and Jose Roa testified about the October 15 meeting and for the most part, their testimony corroborated Betancourt. For example, Frias testified that when Moya wanted to end the meeting, it was Betancourt who said that he wanted to reach an agreement and that if no agreement could be reached, the drivers would send a letter to the Labor Department. Frias testified that the accountant jumped up and said: "How can you say that? You know that if the Labor Department comes to us, they'll destroy us." Similarly, Roa testified that when Betancourt said that he was going to send a letter to the Labor Department, the accountant said: "What are you going to do? You're going to destroy the company? Did you want to be out of a job? And everybody going to lose; you're going to lose everything and you no going to have no job at all."

Moya testified about the meeting and essentially denied that she or Carrera made any threats to the drivers. The Respondent, in a letter to the Region dated January 6, 2006, stated that after Moya explained to the drivers that they were independent contractors and that there was no method for paying for sick time, holidays, etc., because her fees were fixed by Antech. This letter also goes on to state that Moya, indicated that "the subcontractors were free to perform services with anyone else and if they wanted to, they could terminate their contract with Igramo Enterprise, Inc."

Carrera also testified about the meeting and similarly denied that he or Moya made any threats. He did recall, however, that Betancourt was "very pushy" at the meeting and that Betancourt did say that the drivers would go to the Department of Labor.

With respect to the October 15 meeting, there are two things that are apparent to me. First, except for a brief welcome by Frias, he did not have anything else to say at this meeting. The evidence shows that the principle people who spoke at the meeting for the drivers were Gustavo Betancourt, Jaime Alarcon, Jose Roa, Annabelle Jost and Barrera. (The latter two being relatives of Moya). Second, the evidence shows that although the meeting was originally

set up to discuss gasoline prices and the possibility of getting additional compensation to make up for the cost increases, the driver's demands, to the surprise of Moya, were expanded to include a variety of other benefits, such as holiday pay, sick leave, etc.

In my opinion as long as the discussion centered on the gas price issue, this was not viewed with much alarm by Moya. There is, in fact, credible evidence to show that she was not averse to helping the drivers in this respect if she could get Antech to foot the bill. But it is also my opinion that when the discussion went off that point and started to be about providing various other employee benefits, this was viewed as more challenging. And when Betancourt said that the drivers would send a letter to the Department of Labor, this was viewed by Moya and Carrera as a crisis because, as expressed by Carrera, this could result in the destruction of the Company. In short, when Betancourt made the latter statement, I believe that Carrera, in effect, threatened that the Company would go out of business and that Moya said that if the drivers wanted these additional benefits, [and therefore be construed as employees], they were free to leave the company. Inasmuch as the drivers, who were actually employees, had been paid by the Company as independent contractors and were not paid in accordance with various Federal and State laws, including the FLSA, the possibility of having the Department of Labor look into the relationship would be a substantial threat to the Company's method of doing business. It therefore is in my opinion that it is highly probable that it would have elicited the responses that were attributed to Moya and Carrera. [2] In this respect, I therefore credit the testimony of Frias, Betancourt and Roa.

According to Frias, Markles Rosado told him on October 22, 2005 that he was being fired. Frias states that when he asked why, Markles said that he was acting on behalf of Moya and that Alarcon had said that Frias was the leader of this mess. Frias states that after Betancourt arrived at the scene and said that the firing was not fair, the other person in the office, William Aspiazu, Moya's son, told Betancourt that he shouldn't talk and that he was next.

Betancourt also testifying about October 22, 2005, stated that he was in the office and overheard Rosado tell Frias that Moya had ordered that Frias be fired. Betancourt states that Rosado said that Frias was fired for being the leader of the problem and that he had made a mistake at one of the hospitals. According to Betancourt, when he intervened and asked why Frias was being fired, Aspiazu said; "you had better shut up because you're going to be next."

Frias testified that on October 23, he went to the office to plead with Moya for his job. He states that when he asked why he was fired, she replied that he made mistakes, that he didn't follow the company's rules and that he didn't do the work. According to Frias, he told Moya that he had been told the previous day that he had been fired because he was a leader and now he was being given a different reason. He states that he told her that he needed the job because his family depended on him and she replied: "You should have thought of that before."

According to Betancourt, on October 25, 2005, Moya told him that he no longer could give out supplies to the other drivers and that he was being taken off his night route. He testified that she said that all of us that were involved in this problem were going to suffer drastic consequences. Betancourt testified that Moya said: "That God and her Jewish lawyer

[2] The evidence also shows that Roa, at the October 15 meeting, accused Moya of getting extra money from Antech to pay for the higher cost of gasoline, but not passing it along to the drivers. This also would be a good reason for her to be annoyed, but I note that Roa, who made the accusation, continued to be employed.

protected her; that she wasn't afraid because the Labor Department couldn't do anything against her; and that if I didn't want to work, to sign my resignation and leave the office." With respect to the changes, Betancourt had previously taken out supplies to the drivers without being compensated for that service. He therefore suffered no harm as a result of that change. However, being taken off the night route cost him about $135 per week.

Betancourt testified that on or about November 30, 2005, Moya called and asked why he was doing so much harm to Gildardo Ortiz, (the principle company supervisor), by making a complaint against him. [Probably referring to the charge that was filed by Frias in Case No. 29-CA-27247]. Betancourt states that Moya said that if we kept doing this, she was going to be forced to fire us all. He states that he didn't want to do any harm to Gildardo and that the Complaint was not against him; it was against the Company.

According to Betancourt, he had another conversation with Moya on Monday, December 5, 2005 during which she said that if he kept making problems for the Company she was going to fire him. Betancourt states that she said that Jack Buckley, (from Antech) was displeased and had said that they should get rid of him.[3] Betancourt testified that Moya repeated her praise of God and Jewish lawyers who she said would protect her from the Labor Department. He also states that Moya said that the drivers were independent workers; that she wasn't going to give them anything; and that she preferred to lose the company or go bankrupt before giving them anything.

With respect to Betancourt, the Respondent asserts that it ceased having him deliver supplies to the other drivers because management believed that he had copied the other driver's checks. Whether true or not, this doesn't much matter as this aspect of Betancourt's job was, according to his own testimony, voluntary and the elimination of this function was no detriment to him. I therefore do not think that this action amounted to a violation of the Act.

However, the elimination of a night route clearly was a detriment and cost Betancourt about $135 per week. The Respondent contends that this route had been done by Harold Gonzalez about five months before and that Moya simply gave the route back to Gonzalez because Betancourt was constantly complaining that he wasn't getting enough compensation for the route.

By the time of the October 15 meeting, Betancourt had been doing the route for a relatively long period of time. The elimination of this route and the concomitant reduction in his pay, took place soon after the October 15 meeting. It should be recalled that, a written list of demands had been presented at this meeting, (General Counsel Exhibit 11), and Betancourt said that he intended to send a letter to the Department of Labor if there was no resolution. As this was, in my opinion, construed by the Company to mean that Betancourt intended to make a complaint to that agency about the driver's pay, Moya and Carrerra responded with alarm because this could upset the basic relationship where, in terms of their pay, (and taxes), the Respondent had treated the drivers as if they were independent contractors.

In my opinion, Betancourt was engaged in protected concerted activity when, in the context of the October 15 meeting he stated that unless there was some resolution of the

[3] At this point, Frias had filed an unfair labor practice charge and Betancourt did not file a charge until December 13. In context, it seems that Betancourt and Moya were talking about the charge that Frias had filed and that her statement that Jack had said that the Respondent should get rid of "him" seems to refer to Frias and not Betancourt.

driver's problems, he was going to send a letter to the Department of Labor. As it is my opinion that the credible evidence establishes that the Respondent took away a route because of Betancourt's participation in and the statements he made at the October 15 meeting, I conclude that the Respondent has violated Section 8(a)(1) of the Act. *Kysor Industrial Corp*., 309 NLRB 237, (1992).

Orces Frias' case is different.

Other than signing the original August 12 petition, there is little evidence to suggest that Frias was a "leader" amongst the employees to get better wages and benefits. At the October 15 meeting, the drivers who spoke up were Betancourt, Roa, Alarcon, Jost and Barrera. Frias had nothing to say.

On direct examination, Frias asserted that before his discharge he had never received any warnings from the Respondent. *This was not true*. On cross examination he conceded that in March 2005, Moya had told him she was going to give him one more chance and that the "next time you're gone."

The credible evidence shows that in March 2005, Moya had been told that Frias had failed to make a call regarding a company on his route that was an "on call" pick-up and that as a result, he failed to pick up the blood samples. Moya testified that she told Frias that he was not doing his job and that she was giving him one last chance. This incident occurred well before there was any concerted activity amongst the drivers and this warning therefore could not have been motivated by any concerted protected activity on the part of Frias. According to Moya, she had decided to fire Frias at that time but changed her mind.

Jack Buckley, Antech's traffic manager, testified that over a period of weeks in the latter part of 2005, he received about three or four calls that the driver of route 76 was arriving too early for the pickups at two hospitals and that the driver had refused to return when asked to do so. Buckley states that after he received several of these calls, he called either Moya or Gildardo to have this situation fixed. In this regard, Buckley testified that he did not know who the driver was and couldn't care less. He just wanted the problem fixed.

Moya testified that Gildardo Ortiz told her that he received a call from Buckley complaining about the failure to make pickups on route 76. Realizing that the driver was Frias, she again decided to fire him.

Markles Rosado testified that he had received reports that Frias was not making pickups and that he was told that Buckley had spoken to Moya and told her that the problem had to be fixed. Rosado testified that on October 23 or 24, he told Frias that he was being fired and did so in the presence of Betancourt. According to Rosado, he told Frias that the reason was because Frias was not making his pickups. He denied that he said anything about Frias being a leader or that he was being fired because of his concerted activity.

For his part, Frias denied that he refused to make the calls or that he failed to make the pickups.

Frias testified, however, that on or about September 26, 2005, Markles Rosado called him while he was on the road and asked if he had called the lab. Frias states that Rosado said that the guys were telling him that Frias had passed it by. According to Frias, he told Rosado that when he called, they said that they didn't have anything. He also states that when Rosado said that he had to return, he told Rosado that he was an hour away from the hospital and

couldn't go back. This incident took place, according to Frias, several weeks before the October 15 meeting.

Frias also testified that on or about October 14, 2005, (the day before the meeting), Rosado again asked him if had failed to pick up samples from one of his locations. According to Frias, Rosado told him to forget about it and that he (Rosado) would take care of the pickup.

Taken together, the testimony of Frias, Rosado, Moya and Buckley shows that in March 2005, Frias was almost fired because of pickup problems along his route. The evidence also shows that before the October 15 meeting, where the demands for additional employee benefits and the threat to go to the Department of Labor caused the fan to be severely jostled, Frias had been involved in at least two more instances where he failed to pick up samples along his route and had been told of this by Rosado. Although Buckley did not testify that he insisted that the driver on Route 76 be fired, it is clear to me that given the past warning, Moya reasonably could have made the decision that Frias was not performing his job properly and should be dismissed.

On the basis of the record as a whole, I conclude that the Respondent's discharge of Moya was for cause and that it was not motivated by any protected concerted activity on his part or on the part of other employees. I therefore recommend that this aspect of the case be dismissed.[4]

Conclusions of Law

1. By threatening employees with discharge or by telling them that they could resign, because of their protected concerted activities, the Respondent has violated Section 8(a)(1) of the Act.[5]

2. By telling employees that if they sent a wage complaint to the Department of Labor, the Company could be destroyed or go out of business, the Respondent violated Section 8(a)(1) of the Act.[6]

3. By taking a route away from Gustavo Betancourt and thereby reducing his earnings, because of his protected concerted activity, the Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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[4] Buckley, as far as I can see, had no particular reason to shape his testimony to protect Igramo which is merely one of twelve courier companies that work for Antech. Based on his demeanor, I thought that he was a credible witness. As the testimony of Moya and Rosado was essentially consistent with Buckley's testimony regarding the events leading up to Frias' discharge, I shall also credit their testimony in this respect even though I think that the testimony of Moya was not particularly reliable in relation to the October 15 meeting.

[5] Gustavo Betancourt testified that he had several conversations with Grace Moya where she made threats of discharge. In my opinion, Betancourt conflated some of these conversations. Therefore, although I credit his assertion regarding the threats, I think that it is highly likely that this occurred after and not before the October 15, 2005 meeting.

[6] Since Carrera, the Company's accountant was brought to the October 15 meeting by Moya and was asked by her to speak to the drivers, I conclude that he was an agent for the Company with respect to those statements he made at the meeting.

5. The Respondent has not violated the Act in any other manner encompassed by the Complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the Respondent illegally took away a route from Gustavo Betancourt, it must offer this route back to him, or if that route no longer exists, a substantially similar route, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of such refusal less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [7]

ORDER

The Respondent, Igramo Enterprise Inc., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with discharge or by telling them that they could resign, because of their protected concerted activities.

(b) Telling employees that if they send a wage complaint to the Department of Labor, the Company could be destroyed or go out of business.

(c) Taking away routes from employees and thereby reducing their earnings because of their protected concerted activity

(d) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gustavo Betancourt full reinstatement to all routes he had as of October 15, 2005 and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix." [8] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Employer has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 15, 2005.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., September 15, 2006.

_____
Raymond P. Green
Administrative Law Judge

[8] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discharge or by telling them that they could resign, because of their protected concerted activities.

WE WILL NOT tell our employees that if they send wage complaints to the Department of Labor, the Company could be destroyed or go out of business.

WE WILL NOT take routes away from employees and thereby reduce their earnings because of their protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL offer Gustavo Betancourt full reinstatement to all routes he had as of October 15, 2005 and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

IGRAMO ENTERPRISE, INC.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two Metro Tech Center, 100 Myrtle Avenue, 5th Floor
Brooklyn NY 11201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.